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JAN 17 2012

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re) Case No 11-49288-E-13
LYUDMILA KISHCHENKO,)
Debtor(s))
-----)

This memorandum decision is not approved for publication and may
not be cited except when relevant under the doctrine of law of the
case or the rules of claim preclusion or issue preclusion

MEMORANDUM OPINION AND DECISION

Liliya Walsh has filed a Motion for relief from the automatic
stay pursuant to Local Bankruptcy Rule 9014-1(f)(2). The original
Proof of Service states that the Motion and supporting pleadings
were served on the Chapter 13 Trustee and Office of the United
States Trustee on December 23, 2011. By the court's calculation,
18 days' notice was provided. Fourteen days' notice is required.
However, the Proof of Service filed indicates that the Motion was
sent to "Andrey Kishchenko" (Dkt 17). Mr. Kishchenko is the
Debtor's husband and commenced his own Chapter 13 case in November
2011, in which Movant filed a motion for relief from the automatic
stay.

Movant appeared at the January 10, 2012, hearing and presented the court with a proof of service attesting to service of the pleadings on the Debtor. The Proof of Service was filed on January 10, 2012 (Dkt 24). Proper notice and service has been provided.

The hearing was continued to January 17, 2012, at 10 30 a.m., at which time both the Movant and Debtor appeared. The court conducted the hearing and issues this Decision on the Motion.

MOTION FOR RELIEF FROM STAY

Movant seeks relief from the automatic stay to allow her to proceed with obtaining possession of real property commonly known as 2201 Raintree Court, Rocklin, California. It is alleged that Movant rented the property to the Debtor and her husband, Andrey Kishchenko. When the rental relationship came to an end, Movant served several three-day notices to vacate the property. When the Debtor and Andrey Kishchenko did not vacate, Movant commenced an unlawful detainer proceeding in state court. Trial in the unlawful detainer action was scheduled for November 28, 2011, but was stayed by Andrey Kishchenko when he filed a Chapter 13 bankruptcy case. That Chapter 13 case was dismissed on December 5, 2011.

The unlawful detainer trial was rescheduled for December 23, 2011. That trial was stayed by the Debtor commencing the instant Chapter 13 case. It is alleged that the Debtor and her husband have filed a series of bankruptcy cases solely for the purpose of disrupting the state court unlawful detainer process, without any intention to engage in a good faith Chapter 13 reorganization.

Movant further asserts that her family is suffering a significant hardship by the Debtor and Andrey Kishchenko failing to

1 return possession of the property to Movant Rent has not been
2 paid, while Movant continues to have the expenses for the property
3 No payment of rent has been made for the months of September,
4 October, and November 2011 More significantly, Movant's family
5 needs to use the 2201 Raintree Court, Rocklin, California property
6 as its personal residence

7 The Declaration of Liliya Walsh is provided in support of the
8 motion She provides testimony as to the attempts to obtain
9 possession of the property, the providing of three-day notices, and
10 commencing the unlawful detainer proceedings She also testifies
11 to the failure of the Debtor to make full rent payments since
12 October 2010, and the failure to make any rent payments for the
13 months of September, October, and November 2011 She states that
14 the lease was terminated on January 31, 2010, and the Debtor was in
15 possession on a month-to-month lease

16 The Motion asserts that the present bankruptcy filing is part
17 of a delay tactic connected to the Andrey Kishchenko bankruptcy
18 filing It is asserted that the Andrey Kishchenko Chapter 13
19 filing and the present Chapter 13 filing are a coordinated effort
20 to deprive Movant of her right to possession of the property The
21 Movant directs the court to consider the prior Chapter 7 case filed
22 by the Debtor and Andrey Kischchenko, in which both received their
23 discharge in July of 2010

24 **OPPOSITION STATED AT THE HEARING**

25 The Debtor appeared at the hearing and asserted that the
26 Movant should not be granted relief from the automatic stay for
27 several reasons First, she contends that the property has been
28 transferred into a trust The Movant does not dispute that it has

1 been transferred into a trust, and asserts that Movant is the
2 beneficiary of the trust and manages the trust property

3 The Debtor next argues that she disputed the arrangement by
4 which she and her husband were given possession of the property and
5 that they did not have to give possession back to Movant. These
6 real property and contract issues well exceed the summary scope of
7 a motion for relief and are properly the subject of the pending
8 unlawful detainer proceeding. The Debtor could not state any
9 bankruptcy issues relating to this dispute.

10 The Debtor was asked, and could not provide information to the
11 court as to what reorganization was being attempted. The only
12 answer given was that the Debtor and her husband have some tax
13 liability they need to address. The Debtor also stated that she
14 did not know what was to happen in the bankruptcy case, but she had
15 an attorney who was working on the papers. When asked the
16 attorney's name, the Debtor's response was "Dave," and she was
17 unable to provide any last name.

18 In response to the court's inquiry as to why she did not file
19 bankruptcy with her husband in November 2011, and why was his
20 bankruptcy filing and the current bankruptcy filed by her on the
21 eves of the original and reset state court unlawful detainer
22 trials, the Debtor's response was that it was because a tax debt
23 would appear on their credit report. Further, she could not
24 provide the court with any explanation as to why she and her
25 husband were filing separate cases if each of them needed to
26 reorganize.

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1 **TWO PRIOR BANKRUPTCY CASES**

2 Case 10-28185 Andrey Kishchenko and Lyudmila Kishchenko

3 Chapter 7
4 Case Filed March 31, 2010
5 Discharge Entered July 7, 2010
6 Case Closed August 6, 2010

7 This Chapter 7 case was filed by the Debtor and her husband,
8 Andrey Kishchenko. The address for the Debtor and her husband is
9 listed as 2201 Raintree Court, Rocklin, California. The Statement
10 of Financial Affairs list the two debtors as having \$7,040.00 in
11 income in 2009, and \$0.00 income in 2010. Schedule J lists an
12 expense of \$1,450.00 a month for rent or mortgage. No creditor
13 with a secured claim is listed on Schedule D and Schedule G does
14 not list a lease.

15 Case 11-47064 Andrey Kischchenko

16 Chapter 13
17 Case Filed November 11, 2011
18 Case Dismissed December 5, 2011

19 This Chapter 13 case was filed solely by Andrey Kishchenko,
20 the co-debtor of Lyudmila Kishchenko in the Chapter 7 case. On his
21 bankruptcy petition, Andrey Kishchenko lists 2201 Raintree Court,
22 Rocklin, California, as his address. On page two of the Petition,
23 Andrey Kishchenko incorrectly states that he has not filed any
24 prior bankruptcy case in the eight years preceding the commencement
25 of his present case. On the Summary of Schedules, Andrey
26 Kishchenko states that he has \$0.00 of real property assets and
27 \$0.00 of personal property assets. Further, that he has \$0.00 of
28 secured claims, \$0.00 of unsecured priority claims, and \$1,500.00
 of unsecured non-priority claims. Schedule A attached to the
 petition lists 2201 Raintree Court, Rocklin, California as an

1 asset, with the value stated as "unknown " Schedule F lists one
2 creditor, named "Rental" with an address of 2201 Raintree Court,
3 Rocklin, California, having a claim in the amount of \$1,500 00 A
4 Notice of Incomplete filing was issued by the Clerk for Andrey
5 Kishchenko's failure to file a Chapter 13 Plan, Means Test,
6 Schedules B, C, D, E, G, H, I, and J, and Statement of Financial
7 Affairs

8 The Verification of Master Mailing List filed by Andrey
9 Kischenko lists only one person, "Rental, 2201 Raintree Court,
10 Rocklin, California 95765 " Mr Kischenko failed to file the basic
11 pleadings necessary to prosecute a Chapter 13 case identified in
12 the Notice of Incomplete Filing and the court dismissed the case

13 The Movant filed a motion for relief from the automatic stay
14 in Mr Kischenko's case The case having been dismissed prior to
15 the hearing on the motion for relief, it was denied as moot The
16 motion in Mr Kischenko's case is substantially the same as the
17 Motion filed in the Lyudmila Kishchenko case now before the court

18 **CURRENT LYUDMILA KISHCHENKO CHAPTER 13 CASE**

19 The Petition filed in this case lists 2201 Raintree Court,
20 Rocklin, California, as the Debtor's residence On page 2 of the
21 Petition, the Debtor incorrectly states that she and her spouse
22 have not filed any other bankruptcy cases in the eight year period
23 preceding the commencement of the instant case Schedule A lists
24 the 2201 Raintree Court, Rocklin, California, property as an asset,
25 with the value stated as "unknown " Schedule F lists one creditor
26 holding a general unsecured claim This creditor is stated to be
27 "Rental, 2201 Raintree Court, Rocklin, CA," with the claim listed
28 as disputed and unliquidated, in the amount of \$1,500 00 The

1 Verification of Master Mailing List filed by the Debtor lists only
2 one person, "Rental, 2201 Raintree Court, Rocklin, California
3 95765 " These pleadings appear to be substantially the same as
4 those filed by Andrey Kischenko in Case No 11-47064

5 The Clerk issued a Notice of Incomplete Filing of documents in
6 this case, with the Debtor failing to file the Chapter 13 Plan,
7 Means Test, Schedules B, C, D, E, G, H, I, and J, and the Statement
8 of Financial Affairs On January 5, 2012, the Debtor filed a
9 Request for Extension of Time to File and Complete Schedules The
10 grounds stated for the extension was "Due to multiple business
11 activities, and financial issues " No order on the motion to
12 extend was entered by the court None of the missing documents
13 have been filed by the Debtor as of January 17, 2012

14 The Chapter 13 Trustee has filed a statement of non-opposition
15 to the Motion for Relief From the Automatic Stay January 6, 2012
16 docket entry On January 13, 2012, the Chapter 13 Trustee filed a
17 Motion to Dismiss the case for failure to file documents and
18 unreasonable delay which is prejudicial to creditors

RULING

20 Pursuant to Local Bankruptcy Rule 9014-1(f)(2), if the
21 responding party appears at the hearing and presents an opposition
22 or good cause, the court will set the matter for further hearing
23 With respect to this motion, the Debtor has not stated an
24 opposition to the Motion The majority of her argument would be
25 the opposition in the unlawful detainer proceeding, not a summary
26 bankruptcy motion for relief from the stay proceeding See *Hamilton*
27 v *Hernandez*, No CC-04-1434-MaTK, 2005 Bankr LEXIS 3427 (B A P
28 9th Cir Aug 1, 2005), relief from stay proceedings are summary

1 proceedings which address issues arising only under 11 U S C
2 Section 362(d) *Hamilton*, 2005 Bankr LEXIS 3427 at *8-*9 (citing
3 *Johnson v Righetti (In re Johnson)*, 756 F 2d 738, 740 (9th Cir
4 1985)) The court does not determine underlying issues of
5 ownership, contractual rights of parties, or issue declaratory
6 relief

7 Additionally, when unable to respond to questions as to what
8 the Debtor, as a *pro se* litigant, was trying to accomplish through
9 the bankruptcy process, reference was made to "Dave" the attorney
10 who was working on the paperwork No attorney has appeared for the
11 Debtor in this case

12 No colorable opposition to the Motion has been presented by
13 the Debtor Merely contending that the automatic stay should
14 prevent an unlawful detainer proceeding from being conducted, and
15 the state court judge properly addressing the issues of right to
16 possession of the property, does not state an opposition to the
17 Motion

18 The automatic stay may be terminated for cause pursuant to
19 11 U S C § 362(d)(1) or because there is no equity in the property
20 for the Debtor and it is not necessary to any effective
21 reorganization, 11 U S C § 362(d)(2) For this Motion, both
22 grounds apply

23 Based on the evidence provided, the court finds that Debtor
24 has no equity in the property Once a movant under 11 U S C
25 § 362(d)(2) establishes that a debtor has no equity, it is the
26 burden of the debtor to establish that the collateral at issue is
27 necessary to an effective reorganization *United Savings Ass'n of*
28 *Texas v Timbers of Inwood Forest Associates Ltd*, 484 U S 365,

1 375-76 (1988), 11 U S C § 362(g)(2) However, Debtor has not
2 filed a plan or presented opposition showing that the subject
3 property is necessary to an effective reorganization Based upon
4 the evidence submitted, the court determines that there is no
5 equity in the property for either the Debtor or the Estate
6 11 U S C § 362(d)(2)

7 To the extent Movant was seeking relief for "cause" under
8 § 362(d)(1), the court maintains the right to grant relief from
9 stay for cause when the debtor has not been diligent in carrying
10 out his or her duties in the bankruptcy case, has failed to make
11 required payments, or is using bankruptcy as a means to delay
12 payment or foreclosure *In re Harlan*, 783 F 2d 839 (B A P 9th
13 Cir 1986), *In re Ellis*, 60 B R 432 (B A P 9th Cir 1985)
14 Cause includes the interests of the Movant not being adequately
15 protected Under the facts and circumstances of this motion, the
16 court further determines that Movant's interests, as the owner of
17 property under an alleged terminated lease, are not adequately
18 protected Movant's recourse under this situation is to address
19 the issue in the state court unlawful detainer proceeding, in which
20 the Debtor can assert her rights to the extent that such relief is
21 not warranted The court determines that cause exists for
22 terminating the automatic stay since the Debtor failed to make
23 post-petition payments 11 U S C § 362(d)(1), *In re Ellis*, 60 B R
24 432 (B A P 9th Cir 1985)

25 **RELIEF PURSUANT TO 11 U S C § 362(d)(4)**

26 While the legal basis for the relief requested was not pled
27 with the clarity of an attorney, this *pro se* Movant has asserted
28 that the multiple filing of bankruptcy cases by the Debtor and her

1 husband, Andrey Kischenko, have been part of a scheme to improperly
2 delay the state court unlawful detainer proceeding Movant
3 expressly asserts that under the facts of the two cases, the Debtor
4 is not attempting any honest prosecution of the bankruptcy case
5 This is a contention that the Debtor is not proceeding in good
6 faith

7 In addition to the first two grounds for relief from the
8 automatic stay, 11 U S C § 362(d)(4) provides further relief with
9 respect to the automatic stay of an act against real property when
10 the court finds that the filing of the bankruptcy petition was
11 part of a scheme to delay, hinder, and defraud creditors that
12 involved either (1) transfer of all or part of the property or (2)
13 multiple bankruptcy filings affecting such real property

14 The unlawful detainer proceeding was filed on August 9, 2011
15 It was amended October 20, 2011, to include the amount owed for
16 past due rents Though the Debtor and Andrey Kischenko had
17 discharged their obligations in the 2010 Chapter 7 bankruptcy case,
18 they had fallen into default on their rent obligations After the
19 rental arrangement was terminated and Movant concluded the month-
20 to-month rental, the Debtor and Andrey Kischenko retained
21 possession of the property

22 On the eve of the first date set for the unlawful detainer
23 trial, Andrey Kischenko commenced his Chapter 13 case with a
24 skeletal filing He failed to file the basic pleadings necessary,
25 and that case was dismissed From reviewing what was filed, the
court cannot discern any reorganization to be undertaken

27 Following the dismissal of the Andrey Kischenko case, the
28 unlawful detainer trial was reset for December 23, 2011 The Debtor

1 commenced the present Chapter 13 case with her skeletal filing on
2 December 21, 2011 None of the additional basic documents required
3 to prosecute a Chapter 13 case have been filed by the Debtor,
4 notwithstanding 27 days having passed since this case was
5 commenced From the documents filed, the court cannot discern any
6 good faith reorganization being attempted in this case Further,
7 it appears that the skeletal pleadings used for this case are
8 substantially the same as used by Andrey Kischenko in his prior
9 Chapter 13 case

10 The court also considers that the Debtor and Andrey Kischenko
11 both incorrectly stated under penalty of perjury in their separate
12 Chapter 13 Petitions that neither they nor their spouse had
13 commenced any bankruptcy cases in the eight year period preceding
14 the commencement of their respective Chapter 13 cases Both listed
15 their one creditor holding a general unsecured claims as "Rental,"
16 and then used their own address for that "creditor " Neither the
17 Debtor nor Andrey Kischenko listed Movant, the person who was
18 pursuing them in the state court unlawful detainer action

19 The court finds that the filing of the present bankruptcy case
20 is one where multiple bankruptcy cases have been filed as part of
21 a scheme to delay, hinder and defraud Movant, a creditor Upon
22 such finding, the court further orders that this order for relief
23 from the automatic stay will be binding in any subsequent
24 bankruptcy filings as to this property for a period of two years
25 from the date of the order granting relief from the stay, if this
26 order is properly recorded

27 In granting the 11 U S C § 362(d)(4) relief, the Debtor is
28 not without remedy She may properly assert her rights and

1 defenses in the state court unlawful detainer action. Further, in
2 a subsequent bankruptcy case the judge may, based on a change in
3 circumstances or good cause shown, may grant relief from this order
4 after notice and hearing.

5 The court shall issue an order terminating and vacating the
6 automatic stay to allow Liliya Walsh, and her agents,
7 representatives and successors, to exercise her rights to obtain
8 possession and control of the real property commonly known as
9 2201 Raintree Court, Rocklin, California, including unlawful
10 detainer or other appropriate judicial proceedings and remedies to
11 obtain possession thereof.

12 The moving party has alleged adequate facts and presented
13 sufficient evidence to support the court waiving the 14-day stay of
14 enforcement required under Rule 4001(a)(3).

15 No other or additional relief is granted by the court.

16 This Memorandum Opinion and Decision constitutes the court's
17 findings of fact and conclusions of law in this contested Matter.
18 Fed R Civ P 52, Fed R Bank R 9014, 7052. Because a hearing
19 on a Motion for Relief From the Automatic Stay is a summary
20 Proceeding, the findings of fact and conclusions of law made by the
21 court are limited to this Motion only, and no determination is made
22 as to the respective rights of the parties, including, without
23 limitation, the Debtor's right to occupy, possess, or deliver
24 possession of the real property, and the existence or non-existence
25 of any lease or rental agreement.

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The court shall enter an order granting relief from the automatic stay consistent with this Decision

Dated January 17, 2012

~~RONALD H SARGIS, Judge
United States Bankruptcy Court~~

1 **CERTIFICATE OF MAILING**

2 The undersigned deputy clerk in the office of the United
3 States Bankruptcy Court for the Eastern District of California
4 hereby certifies that the attached document(s) was served by mail
5 to the following entities listed at the address(es) shown below

6 Service List

7 Liliya Walsh
8 PO Box 1202
9 Rocklin, CA 95677

10 Lyudmila Kishchenko
11 2201 Raintree Ct
12 Rocklin, CA 95765

13 David Cusick
14 PO Box 1858
15 Sacramento, CA 95812-1858

16 Office of the U S Trustee
17 Robert T Matsui United States Courthouse
18 501 I Street, Room 7-500
19 Sacramento, CA 95814

20 DATE 1/17/2012

21 _____
22 Deputy Clerk



23 Mark D. Swim

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